TABLE OF CONTENTS

PAGE

Petition for Certiorari:

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitution and Statutes Involved 4

Statement of Facts 6

Specifications of Error to be Urged 9

Reasons for Granting of Writ 9

Conclusion 23

Brief:

Argument 12

TABLE OF CASES CITED

Boyd v. Grand Trunk Western R. R., 337 U. S. 923, 70 S. Ct. 26 ..... 10, 16

Branceolone v. Northern Stevedoring Co., Inc., 224 App. Div. 562 (1st Dept.) 11, 22

Callen v. P. R. R., 332 U. S. 625, 68 S. Ct. 296 (1948) .. 3, 9, 10, 17, 21

Camp v. Thompson, 167 F. 2d 733 10

Chisholm v. Reading Co., 157 F. 2d 768, cert. den. 329 U. S. 907 16

Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949) 21

Duncan v. Thompson, 315 U. S. 1, 6, 62 S. Ct. 422 (1942) 10, 15

PAGE

Erie R. R. v. Winfield, 224 U. S. 170, 37 S. Ct. 556 (1916) 10, 12

Fitzgerald v. Harbor Lighterage Co., 224 N. Y. 132 ... 11, 22

Hoffman v. N. Y. N. H. & H. R. R., 74 F. 2d, 227, 231 22

Irish v. Central R. R. of Vermont, 164 F. 2d 837 ..... 10, 21

Landreth v. Wabash R. R., 153 F. 2d 98, cert. den. 328 U. S. 855 14

Larscy v. Hogan Sons, 239 N. Y. 298 ..... 11, 22

Lavender v. Kurn, 327 U. S. 645, S. Ct. 740 (1946) 21

Meaney v. Keating, 102 N. Y. S. (2) 514, 519 ..... 11, 22

N. Y. Central R. R. v. Winfield, 244 U. S. 147, 37 S. Ct. 546 (1916) 10, 12

Ricketts v. P. R. R., 153 F. 2d 757 ..... 10, 23

Scarborough v. P. R. R., 154 Pa. Sup. 129 (1945) 16

Scarborough v. P. R. R., 149 F. 2d 636, cert. den. 326 U. S. 755 16

Tenant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944) 21

Trucco v. Erie R. R., 353 Pa. 320, cert. den. 328 U. S. 843 16

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 29, 36 S. Ct. 444 (1943) 21

Thompson v. Camp, 167 F. 2d 733 21

TABLE OF STATUTES

Federal Employers' Liability Act, 45 U. S. C. A. §51 .. 4, 6, 15

Boiler Inspection Act, 45 U. S. C. A. §23 ..... 4, 6, 16

New York Compensation Act, §113 ..... 5, 8, 14, 15

TABLE OF AUTHORITIES CITED

7 N. A. C. C. A. 21 L. J. 16

Restatement of Contracts, §32 18

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No.

EDWARD HEAGNEY,

Petitioner,

VS.

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edward Heagney, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit in the above case.

OPINIONS BELOW.

The opinions of the District Court (R. 76, 95) is reported in 91 F. Supp. 775. The opinion of the United States Court of Appeals for the Second Circuit (R. 106), Judge Frank dissenting (R. 114), is reported in 190 F. 2d 976, and its per curiam order denying petition for Rehearing, Judge Frank dissenting, is reported on page 132 of record.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 30, 1951 (R. 123). Petition for rehearing was denied August 24, 1951 (R. 132). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1), 62 Stat. 928, and or Act of February 13, 1925, U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED.

(1) Where Congress by the Federal Employers' Liability Act has occupied the sphere of work sustained injuries by railroad in interstate commerce, may the New York Workmen's Compensation Act provide a system of "election, substitution or waiver" whereby employee is deprived of the remedies and protection of the federal statute and is placed under the state compensation act?

(2) Does not an interpretation of a local compensation act which renders acceptance of payments thereunder a "waiver" of employee's rights under the Federal Employers' Liability Act, create a proscribed "regulation" within the meaning of Section 5 of the Federal Employers' Liability Act and therefore void?

(3) Where employee accepts workmen's compensation benefits indefinite in duration of coverage and amount, in place of rights under the Federal Employers' Liability Act, does acceptance of such benefits constitute a "release" or "compromise" within the meaning of Callen v. P. R. R., 332 U. S. 625, 68 S. Ct. 296 (1948)?

(4) Assuming pro arguendo that acceptance of payments under local compensation act can be a lawful "waiver" or "compromise" within the meaning of Callen v. P. R. R., supra, could the court below properly decide that issue on motion for summary judgment in face of the clear conflict of primary fact as to (a) its existence, (b) its scope and (c) whether obtained by fraud or mistake?

(5) Assuming the New York Workmen's Compensation Act may lawfully contain a provision for election of remedies which properly constitutes a waiver of employee's rights under the Federal Employers' Liability Act, did not the court below erroneously interpret New York court decisions on such "waiver", since admittedly there was yet no "final award" made by the local compensation authorities or "final payment" made by the insurance carrier.

CONSTITUTION AND STATUTES INVOLVED.

The seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers' Liability Act as amended (45 U. S. C. A., Sec. 51, et seq.), which provides in part:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The Federal Employers' Liability Act as amended (45 U. S. C. A. Sec. 23, et seq.), which provides in part:

> "It shall be unlawful for any carrier to use or permit

to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The Workmen's Compensation Law of the State of New York, Sec. 113, reads as follows:

"Sec. 113. INTERSTATE COMMERCE. The provisions of this Chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

STATEMENT OF FACTS.

On January 21, 1947, the petitioner while in the employ of the respondent, a common carrier by railroad, engaged in interstate commerce, sustained a broken back and serious brain injury. He brought suit under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., and the Boiler Inspection Act, 45 U. S. C. A., Sec. 23. In his complaint it was alleged that the petitioner and respondent were engaged in interstate commerce at the time of the accident and that the accident was caused by respondent's negligence and an unsafe locomotive. For the purpose of deciding the motion for summary judgment, such allegations must be treated as being true.

On February 17, 1947, while the petitioner was still suffering great pain from his injuries, respondent's insurance carrier's claim agent had petitioner sign a statement in which there appeared, inter alia, "I have no intention of suing my employer but going to take voluntary compensation." On obtaining this statement, the claim agent delivered the dangled check as the first payment under the New York Workmen's Compensation Law to the petitioner (R. 55).

The first payment was made under this apparent voluntary agreement for compensation. The file was in due course reviewed by an examining clerk of the New York Workmen's Compensation Board, who noted that there might be some doubt as to the Board's jurisdiction in this matter. It was docketed by the Board for hearing after the first examiner had called respondent's insurance carrier on the telephone and pinpointed this issue. The carrier unilaterally brushed it aside, alleging a *mutual* voluntary waiver of federal rights.

At the hearing, while petitioner was present and before the cat could get out of the bag and the employee learn

that important federal rights be possessed were being raised for his protection by the examiner, respondent's counsel quickly shushed the issue by lawyer-talk hocus-pocus saying as if in benign generosity, "No, we waive that. We are paying the man $28.00." (maximum). The impression intended by the carrier's counsel, so far as the examiner was concerned, was that this point had been carefully revealed and discussed with petitioner and bilaterally agreed upon. As to the petitioner, it intended to convey the thought, "This technicality may keep you from getting the full amount of $28.00 allowed by New York law, but we want to be good to you, so we waive that technicality."

Both the Board and the petitioner were fooled. Both courts below recognized and evaluated respondent's conduct for what it was and held that petitioner was not bound thereby, when later respondent moved for summary judgment on the suit under the Federal laws.

The case was marked continued. Payments were made until July 15, 1947, when respondent filled a notice with the Industrial Commissioner stating that compensation had been paid in full and that claimant was able to work (R. 16). Thereafter the petitioner retained the attorney, who later represented him in the District Court action, to represent him before the Compensation Board for the sole issue as indicated on that notice, i. e., a decrease in payments.

Between October 9, 1947 and June 17, 1948, the attorney attended four hearings before the Compensation Board, but at these hearings only a single issue was involved, namely, the rate of compensation that was to be paid (R. 58, 104). During this period no "final" award was made and the case was continued. Though the Board had directed the respondent to continue payments, no payment was made after June 1948 (R. 24, 26). Not once during counsel's relationship with this case was issue of jurisdiction raised, indicated or adjudicated.

While the petitioner's injuries persisted and he was unable to work, his attorney in December 1948 learned for

the first time that the respondent was a common carrier by railroad engaged in interstate commerce (R. 33, 34, 35, 82). At a hearing before the Board in January 1949, the petitioner's attorney formally put the respondent and its insurance carrier on notice that no further payments would be accepted under the New York Workmen's Compensation Law, and that petitioner would pursue his remedy under the Federal Employers' Liability Act (R. 82) although payments had been due since June 1948 by direction of the Board (R. 17).

Action was then started in the United States District Court for the Eastern District of New York within the statute of limitations of the Federal Employers' Liability Act and the Boiler Inspection Act.

On motion by respondent for summary judgment, the learned judge of the District Court below conceded and the Court of Appeals affirmed that petitioner was not bound by any rule of "waiver" until he retained counsel. The judge ruled however that after appearance of counsel petitioner knew or should have known of the issue of jurisdiction and entered summary judgment for respondent, ruling *as a matter of law* that

(1) New York Compensation Act may constitutionally supersede federally created and protected rights, if the parties agreed thereto;

(2) the carrier in a Federal Employers' Liability Act case can bind an injured employee by the New York Workmen's Compensation Act by reason of a "regulation" (Sec. 113) therein, if the employee accedes thereto notwithstanding Sec. 5 of the Federal Employers' Liability Act, prohibiting and rendering null and void such agreements;

(3) notwithstanding conflicts of fact as to (a) the scope and (b) the integrity of such "waiver" as to whether obtained by fraud or mistake on which there was a conflict

of evidence, there had been a binding waiver of all federal rights and that petitioner was thereafter limited to such remedies as are provided by New York Workmen's Compensation Act, because such waiver amounted to an enforceable compromise within the meaning of CALLEN v. P. R. R., 332 U. S. 625, 68 S. Ct. 296, even though no "final award" had been made or paid, no "release" or any synonym therefor had been mentioned, discussed, executed or intended by either party.

To all of these legal conclusions Judge Frank dissented.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court erred:

1. In granting defendant's motion for summary judgment under Rule 56.

2. In the affirmance by the Court of Appeals of grant of summary judgment by the District Court.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's constitutional guarantee of right to trial by jury was violated when the court granted motion for summary judgment by holding that acceptance of payments under New York Workmen's Compensation Act was a lawful "waiver" amounting to a release of all rights under the

Federal Employers' Liability Act, notwithstanding the fact that there was a clear conflict of fact as to the validity, integrity, scope and intent in the offer and acceptance of these workmen's compensation payments and no evidence of an "election" to accept workmen's compensation payments as distinguished from recovery under the Federal Employers' Liability Act. Thus a conflict arises between the instant case and RICKETTS v. P. R. R., 153 F. 2d 757; IRISH v. CENTRAL R. R. OF VERMONT, 164 F. 2d 837; CAMP v. THOMPSON, 167 F. 2d 733; WHITEMARSH v. P. R. R., 61 F. Supp. 850, and CALLEN v. P. R. R., 332 U. S. 625, 68 S. Ct. 296 (1948).

2. The decision of the court below holds that even though the Federal Congress had already occupied that phase of the Interstate Commerce field and legislated on rights for injuries to railroad employees therein, that a state may nevertheless legislate to the contrary, thus establishing a direct conflict with N. Y. CENTRAL R. R. v. WINFIELD, 244 U. S. 147, 37 S. Ct. 546, and ERIE R. R. v. WINFIELD, 224 U. S. 170, 37 S. Ct. 556 (1916).

3. In holding that an agreement to accept compensation payments under New York compensation statute is a "waiver" tantamount to a "compromise" of all federal rights, which thus "exempted" the carrier from its liability under the Federal Employers' Liability Act, contrary to Sec. 5 thereof, a clear conflict was created with DUNCAN v. THOMPSON, 315 U. S. 1, 6, 62 S. Ct. 422 (1942), and BOYD v. GRAND TRUNK WESTERN R. R., 337 U. S. 923, 70 S. Ct. 26, holding such agreements void.

4. Assuming New York may lawfully rule acceptance of workmen's compensation payments constitutes a "waiver" of federal rights, the court below failed to follow and apply the latest New York state decisions which require a "final award" or "final payment" to be made or agreed on

before there can be a "waiver" or "election of remedies". Thus there is a clear conflict with the following New York decisions FITZGERALD v. HARBOR LIGHTERAGE CO., 224 N. Y. 132; LARSCY v. HOGAN SONS, 239 N. Y. 298; MEANEY v. KEATING, 102 N. Y. S. (2) 514, 519; BRANCEOLONE v. NORTHERN STEVEDORING CO., INC., 224 App. Div. 562 (1st Dept.), and a conflict with a prior decision on the same point by the Court of Appeals for the Second Circuit. WYATT v. NEW YORK & O. W. Ry. Co., 45 F. 2d 705, 708.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

CARLTON A. WALLS,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

BRIEF.

ARGUMENT.

I.

Can a state create a variable in a field of interstate commerce where Congress has already preempted the entire field?

In N. Y. C. R. R. v. WINFIELD, 244 U. S. 147 (1916), this court definitely held that the Federal Employers' Liability Act is the exclusive remedy for railroad employees engaged in interstate commerce and in the absence of negligence or a violation of a federal safety appliance law, no recovery may be had, and that the local compensation statute could not fill that breach in aid of the employee. Thus at page 149, the Court said:

> "* * * It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. * * *"
>
> "* * * That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. * * *"

Conversely the court in ERIE R. R. v. WINFIELD, 244 U. S. 171 (1916), held that no state may in that field of

interstate commerce create a substitute system of protective coverage by which the parties might by explicit language or inference "elect" it, as the governing law in place of the Federal Employers' Liability Act. Thus New Jersey statute contained a separate paragraph similar to the New York statute here under consideration in the instant case where the parties can "elect" whether to be bound by the New Jersey statute or the federal statute without regard to negligence. Thus at page 172 the Court said:

> "* * * The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability, and excludes liability in the absence of negligence. In its details, however, that part differs materially from the Federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective," and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall

be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the Federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption. The third question, therefore, must be answered in the negative. * * *"

Clearly then Sec. 113 of the New York Workmen's Compensation statute is unconstitutional. Without the sustaining effect of this section, the entire floor on which the decision below is bottomed falls out and its ratio decidendi is dissipated.

Nor can the case of LANDRETH v. WABASH R. R., 153 F. 2d 98, cert. den. 328 U. S. 855, be of support to the respondent here. In that case the very issue of jurisdiction was put in issue, evidence offered, and a judicial adjudication had. The final judgment of the state court holding the case to be one which occurred in intrastate commerce was res adjudicata of that issue. Whether rightly or wrongly decided is of no importance here. The first court of record to which that issue was presented had passed on it and foreclosed the question from further legal review in any other court of concurrent jurisdiction.

In the instant matter, "jurisdiction" as an issue was never legally presented or decided; the case before the Workmen's Compensation Board of New York is still in the process of issue, and there had never been a res adjudicata determination by the Workmen's Compensation Board to harass or bind the federal courts when this suit under the Federal Employers' Liability Act was before it. As to the one comment on jurisdiction made on May 14, 1947, before the

Compensation Referee, both United States courts have ruled that what was there and then said or done had no legal effect or value in deciding this issue. It was only on the basis of later participation by counsel that the courts below entered judgment on the strength of Sec. 113 of the New York Workmen's Compensation Act—presumably on a theory of ratification by counsel of that which he has consistently denied any knowledge.

II.

Is not Sec. 113 of the New York Workmen's Compensation statute a nullity in view of Sec. 5 of the Federal Employers' Liability Act, 45 U. S. C. A., which prohibits all "exemptions" of carrier liability other than that within the statute itself?

This court in DUNCAN v. THOMPSON, 315 U. S. 1, held that a voluntary agreement between employee and carrier that required employee to first return moneys advanced while the parties engaged in negotiations toward compromise of a claim for injuries sustained in the course of interstate employment before filing suit, was void as being violative of Sec. 5. of the Federal Employers Liability Act, 45 U. S. C. A. 51, et seq.

If in that case an agreement which looked toward "compromise"—a wholly desirable thing—could not be lawful, how can an agreement that completely "exempts" the carrier from its responsibility under the federal act be lawful? That this present alleged agreement would disastrously reduce the financial recovery of the employee, one need but look at the record. For injuries consisting of multiple fractured vertebrae and serious brain damage, this respondent seeks to be exonerated by the pittance payments it has here made under local law totalling less than $2800. For similar injuries verdicts exceeding $50,000 have repeatedly

been sustained in and out of master-servant cases. See 7 N. A. C. C. A. ■ L. J. 21.

This is a case of absolute liability—a violation of the Boiler Inspection Act, 45 U. S. C. A., Sec. 23.

Had this been a case of poor liability this respondent would have raised the jurisdictional issue and insisted on a trial under the federal statutes, with its burdens of proof to be met by the employee.

It is this taking advantage of the uneducated and untutored that is the hazard involved in this decision. These employees know nothing of the legal questions involved on this jurisdictional problem. They must be protected even against themselves—certainly against unprincipled claim agents.

This case opens the door and gives the green light to railroads all over America to hide behind state compensation acts when the negligence is clear and thus limit their financial payments to the pittances allowed by the various state statutes, to plead the jurisdictional defense to compensation claims where negligence cannot be established. This is no empty threat—see SCARBOROUGH v. P. R. R., 154 Pa. Sup. 129 (1945); SCARBOROUGH v. P. R. R., 149 F. 2d 636, cert. den. 326 U. S. 755. See also TRUCCO v. ERIE R. R., 353 Pa. 320, cert. den. 328 U. S. 843, and CHISHOLM v. READING CO., 157 F. 2d 768, cert. den. 329 U. S. 807. Compensation had been denied by the Pennsylvania courts (unreported lower court decision) on jurisdictional grounds.

In BOYD v. GRAND TRUNK WESTERN R. R., 337 U. S. 923, 70 S. Ct. 26, this court held unlawful an agreement by which employee agreed to limit his venue to the place where the accident happened, if after being advanced monthly payments pending negotiations toward settlement, the parties could not arrive at a mutually satisfactory compromise payment. Sec. 5 was held to render that agreement void.

There, all the injured was surrendering was a *portion* of

his *venue*, not complete *jurisdiction* as in the instant case. If what the carrier there sought to achieve was an improper "exemption" from liability, a fortiori the conduct described in the instant case is improper, and is so whether under color of local legislation or not.

An examination of the testimony at that hearing (R. 75) reveals that the carrier, being fully aware that this matter properly belonged under the Federal Employers' Liability Act, did not want the matter adjudicated under that law and did not want the claimant to become aware of the existence of any such law or his rights under it; it quickly silenced any further discussion by changing the subject. It was such practices which the carrier here indulged in that made it necessary for American railroad labor to seek albeit vainly in CALLEN v. P. R. R., 332 U. S. 625, 68 S. Ct. 296 (1948). to have this court place the burden of proof of justifying compromises on the carriers. Since this court refused to adopt that shift of the burden of proof to make it similar to that which prevails in admiralty, this court must be extra vigilant less "compromise" become a fantasia that approves of each and every means of avoidance and exemption of carrier's liability however proper or not. It must not permit CALLEN v. P. R. R. supra, to be extended to the point where fraudulent acts by carriers may assume the respectability of "compromise" which would bind unwary and untutored railroad employees.

III.

Can what was here done by respondent be treated as a "compromise" within the meaning of Callen v. P. R. R., 332 U. S. 625, 68 S. Ct. 296 (1948)?

In the cited case there was a release of *all* liability under the governing law—the Federal Employers' Liability Act. It was an effort at settlement—final, complete and total. A

written release was there executed. A release is the usual prerequisite to settlement.

Here there was no sum certain to be paid. Here there was no release executed setting forth in clear and precise terms the quid pro quo. Here concededly the rights were not being determined under the controlling and applicable statute—the Federal Employers' Liability Act.

This was merely a substituted jurisdiction before whose administrative body the matter had not yet attained the positive definitiveness necessary before any contract (release or compromise) can be held sufficiently clear to enable it to come into existence or be enforced. See Sec. 32 Rest. of Contracts.

IV.

The Court below could not in any event properly rule on the issue of jurisdiction in this case as a matter of law, because of the conflict of evidence as to the basic issue.

The decision of the learned judge of the district court was made on motion for summary judgment. That motion requires that all facts and inferences most favorable to the petitioner here be accepted as true. The case was disposed of on the pleadings and affidavits. The petitioner alleged very serious injuries in his complaint while employed by and acting in furtherance of the interstate commerce aspects of this common carrier by railroad. (Paragraphs III, V and VI.)

The respondent's answer admits it is a common carrier by railroad in interstate commerce in paragraph 1. It does not reply to paragraph V and thus admits those facts therein contained.

Respondent filed a request for admissions under Rule 26 setting forth that petitioner had testified to the character of his work at the time of the accident and filed Exhibit A

to the demand (R. 11), which states, inter alia, that petitioner fell from an engine of a freight train while at work as a hostler. Respondent filed "Defendant's Affidavit in Support of Motion under Rule 36", and plainly concedes that it is relying on Sec. 113 of the New York Workmen's Compensation Act as a "waiver" of conceded rights under the Federal Employers' Liability Act and the Boiler Inspection Act for injuries sustained when he fell from an engine while working as a hostler engaged in interstate commerce.

Respondent filed with the District Court an "Analysis of Plaintiff's Answers to Request for Admissions" (R. 47). All of this is directed to show that though the case properly falls within the Federal Employers' Liability Act and the Boiler Inspection Act, petitioner had waived his federal rights and accepted compensation under the Workmen's Compensation Act of New York. Petitioner in his affidavit contra motion for summary judgment at (R. 54), denied waiving his federal rights, and denied even knowing of their existence. He alleged fraud, misrepresentation, and statements of less than the whole truth, that misled him into accepting payments under the New York law.

In this affidavit his counsel denied having had knowledge of any jurisdictional facts that would put this case under the Federal Employers' Liability Act until shortly before he filed this suit. He denied that any issue of "jurisdiction" was ever raised, discussed or adjudicated at any hearing he attended before the Workmen's Compensation Board of New York in this case.

Petitioner's attorney filed a Supplementary Affidavit (R. 71) in which he denied examining the New York Compensation Board's file in this case to check on the jurisdictional facts, or that he noticed anything in the file about such facts at any time.

Respondent offered its "Supplementary Affidavit" and attached exhibits which contain as respondents evidence the following from the New York Board's records:

> "4/15/47 Called Carr voluntary comp. case. Not under state jurisdiction. P. W. 7.
> 4/15 to M. C. ? of jurisdiction. P. W. 7.
> 4/18/7 101 Called Carr re juris. *Advises interstate. We do not handle interstate juris. on Mot.* Cal. send to trial Cal.
> 4/23 to Cal."

In the face of these conflicts of fact as to:

(1) whether petitioner know of his federal rights;

(2) whether claim agent explained them to him or intentionally concealed them from him, or mistakenly advised him of his rights under the federal law;

(3) whether Carlton A. Walls, Esq., petitioner's counsel, learned of jurisdictional facts before participating in any of the subsequent hearings, the record of none of which reveals any testimony on jurisdiction;

(4) whether respondent's counsel purposely silenced all discussion of the Federal Employers' Liability Act at the hearing on May 17, 1947, which he knew was called for no other purpose than to determine that issue,

it seems difficult to understand therefore how the court below could rule on "waiver" as a matter of law in this case.

In every Federal Employers' Liability Act case whether the question be one of negligence, causation, or even release, this court has invariably held that there is a nondestructible right to a jury's determination of such issues,

once conflicting evidence appears to support a jury finding either way. Here no document of any kind was executed by the employee.

Thus in Negligence:

TILLER v. ATLANTIC COAST LINE R. CO., 318 U. S. 29, 36 S. Ct. 444 (1943);
WILKERSON v. McCARTHY, 336 U. S. 53, 69 S. Ct. 413 (1949).

Causation:

TENANT v. PEORIA & P. U. RY. CO., 321 U. S. 29, 64 S. Ct. 409 (1944);
CORAY v. SO. PAC. RY., 335 U. S. 520, 69 S. Ct. 275 (1949);
LAVENDER v. KURN, 327 U. S. 645, 66 S. Ct. 740 (1946).

Release:

CALLEN v. P. R. R., 162 F. 2d 832, affd. 332 U. S. 625;
IRISH v. CENTRAL R. R. OF VERMONT, 164 F. 2d 837;
THOMPSON v. CAMP, 167 F. 2d 733;
WHITEMARSH v. P. R. R. 61 F. Supp. 850.

In Callen v. P. R. R., supra, the opinion of the Court of Appeals reveals that because some doubt existed as to whether the plaintiff's injuries were permanent, the court in its charge might have possibly misled the jury into assuming as a positive fact, that the injuries were indeed permanent. The court held that that was an issue of fact about which even in the absence of conflicting testimony, the jury would have to pass upon. The charge of the Court did not positively withdraw that issue from the jury; yet

the charge was held to warrant a new trial because that issue seemingly was withdrawn from the jury.

How then could the court below here in the face of these multiple conflicts have ruled on this issue of fact for summary judgment? We respectfully submit that it was in error.

V.

Did not the Court below misinterpret the decisions of the New York Courts on the meaning of sec. 113 of the Workmen's Compensation Act?

We believe the dissenting opinion of Judge Frank correctly states the New York law. It is in accord with the prior decision of the Court of Appeals C. A. (2) on the same question. See WYATT v. NEW YORK & O. W. RY. CO., 45 F. 2d 705, 708, and HOFFMAN v. N. Y. N. H. & H. R. R., 74 F. 2d 227, 231. In all of the following cases it has been held that a final award or a complete accord and satisfaction could constitute a waiver, and satisfaction means full and final payment under a definite award. Nothing less meets the requirement of the New York law. FITZGERALD v. HARBOR LIGHTERAGE CO., 224 N. Y. 132; LARSCY v. HOGAN SONS, 239 N. Y. 298; MEANEY v. KEATING, 102 N. Y. S. (2) 514, 519; BRANCEOLONE v. NORTHERN STEVEDORING CO., INC., 224 App. Div. 562 (1st Dept.); WYATT v. NEW YORK & O. W. RY. CO., 45 F. 2d, 705, 708. We shall not here rehash it with particularity.

A final award has been defined by Judge Frank as "an award of all that the employer was to pay, with nothing more to be awarded." Partial awards and payments thereunder do not constitute a discharge of the claim and therefore even should Sec. 113 of the New York Compensation Act be held constitutional, it could not have the legal effect

given it by the court below. The court below was perhaps moved by a theory of "equitable estoppel". If the equities are to be measured, the righteous indignations favor the petitioner-employee. In deciding this question, certainly the intentional wrongdoing of the claim agent is less pardonable than any carelessness, ignorance or oversight of petitioner's counsel.

In RICKETTS v. P. R. R., 153 F. 2d 757 (C. A. 2), the same court that heard the instant case, with a change of personnel (L. Hand, J., was absent in this case), found a jury issue existed and set aside a release and sustained a verdict on the merits under the Federal Employers' Liability Act for the employee, who allegedly had been misled by his attorney into signing a regular release, in specific compromise of his claim for damages under the Federal Employers' Liability Act, where the employee thought he was merely signing a receipt for wages and tips.

In this case, the petitioner, without the aid and advice of counsel, accepted workmen's compensation payments in a temporary award. His attorney later participated *only* as to proposed reductions or discontinuance of payments under the temporary award. No release was ever executed. No final award was ever rendered. No final payment was ever made.

Yet in RICKETTS v. P. R. R., supra, the court held that employee was entitled to proceed to a trial of his Federal Employers' Liability Act case—in the latter, he was held foreclosed. Such clear inexplicable conflict can only be resolved by certiorari.

CONCLUSION.

It is respectfully submitted that Congress having legislated upon this particular field of interstate commerce, the State of New York was without authority to incorporate,

as it did within its own Workmen's Compensation statute, any elective procedure which would have the effect of undermining or altering the rights and privileges granted to railroad employees under the federal law. Particularly is this true where Congress anticipating that various attempts from different sources might be made to "exempt" carriers from liability under the Federal Employers' Liability Act, wrote into the federal legislation prohibition against the very type of thing that was here done by New York.

There is a marked distinction between a release or compromise, such as properly may be employed to settle any dispute and what could be effected by complying with Sec. 113 of the New York statute. Since this was no compromise but merely a substitution of remedy, the argument that the proceedings before the New York Compensation Board negate the rights of your petiitoner under the Federal Employers' Liability Act should be rejected.

Finally even assuming that New York had the power to create an elective procedure, the courts have recognized that the employee would not be held to have become bound by any such elective procedure until there had been a final award in clear and precise terms and/or final payment made thereunder.

If railroad employees are to be afforded the liberal protection intended by this legislation, then no new loophole may be permitted through which its provisions may be thwarted. Up to this point the carrier has successfully exempted itself by this medium. This leak must be closed.

Only the grant of certiorari can settle this question of the greatest magnitude to railroad employees. Less this court be flooded with petitions for relief in a host of cases, where simple working men are being "done out" of their just awards by this newly achieved crass ingenuity, certiorari should here be granted. Once scuttled, the wane of petitions in Federal Employers' Liability cases which this court has enjoyed during the present term will continue and abate further.

No better argument against Workmen's Compensation on a local basis of administration in these tragic cases could be offered, than that which has here transpired, below.

This case presents no stumbling Georgian "pernicketiness" or laconic Vermontism. This New York statute and the conduct committed in its name and under its authority, is a direct assault in blunt, clear language against Federal omnipotence in a field of interstate commerce already covered by Congress. It must be scotched. Certiorari alone can achieve it. It should here be granted.

Respectfully submitted,

CARLTON A. WALLS,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

No. 488

FILED
JAN 15 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

EDWARD HEAGNEY,

Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

RESPONDENT'S MEMORANDUM

ROBERT E. CURRAN,
THOMAS P. CURTIN,
HENRY A. MULCAHY,
Counsel for Respondent.

INDEX

PAGE

Statement 1

Argument:

POINT I—Section 113 of the New York State Workmen's Compensation Act does not constitute a "variable" in a field already preempted by Congress 6

POINT II—Section 113 of the New York Workmen's Compensation statute is not and does not purport to be "an exemption" within the purview of Section 5 of the Federal Employer's Liability Act, 45 U. S. C. A. 7

POINT III—There being no conflict in a material fact, summary judgment was proper 13

POINT IV—The New York Law supports the prevailing opinion 16

CASES CITED

Blair v. Baltimore and Ohio Railroad, 323 U. S. 600.. 16

Boyd v. Grand Trunk, 338 U. S. 263 9

Brassel v. Electric Welding Co. of America, 239 N. Y. 38 .....7, 17

Callen v. Pennsylvania, 332 U. S. 625, 68 Supreme Court 296 .....5, 12

Duncan v. Thompson, 315 U. S. 1 8

Erie Railroad v. Winfield, 244 U. S. 171 (1916) 6

Fitzgerald v. Harbor Anchorage Co., 244 N. Y. 132 ... 17

PAGE

Hoaglund v. Morse Dry Dock and Repair Co., 255 A. D. 895 19

Irish v. Central Vermont Railroad, 164 Fed. 2nd 837.. 13

Kane v. Morse Dry Dock and Repair Co., 250 A. D. 888, appeal dismissed 277 N. Y. 533, motion to amend remittitur denied, 277 N. Y. 652 18

Larey v. T. Hogan and Sons, Inc., 239 N. Y. 298 ....13, 17

Matter of Doey v. Howland Co., Inc., 224 N. Y. 30 6

New York City Railroad v. Winfield, 244 U. S. 147 (1916) 6, 9

Turner v. Morse Dry Dock and Repair Co., 255 A. D. 896 18

U. S. Pipe and Foundry Co. v. Haynal, 146 Misc. (N. Y.) 812, 818 15

Wyatt v. New York, Ohio and Western Railroad Co., 45 Fed. 2nd 705 12

STATUTE CITED

New York State Workmen's Compensation Act:

Sec. 113 ..... 6, 7
Sec. 123 19

OTHER AUTHORITY

Williston on Contracts, Sections 1846, 1847 12

In the

Supreme Court of the United States

Edward Heagney,

Petitioner,

against

Brooklyn Eastern District Terminal,

Respondent.

RESPONDENT'S MEMORANDUM

Statement

Petitioner's reference to "dangling checks" and "unprincipled claim agents" compels a counter statement.

Throughout this entire proceeding, not one disinterested person impugned respondent: Neither the original compensation Hearer, nor the subsequent ones; nor any of the clerks in the Workmen's Compensation Bureau (84); nor Judge Byers; nor Judges Clark and Chase; nor Judge Frank, in his analytical dissent, even suggested that the conduct of the employer or the carrier was tainted with fraud or overreaching.

The lone judicial dissent below sprung from a discordance on legal principle, not fact.

If this petitioner's acrid prose was intended as a "stop punch", it has worked an inverse effect for his brick bats, shattering his glass dwelling, convoke this guileful pattern:

The idea is and always has been to create a "question of fact"—any fact, at whatever cost.

Petitioner was so convinced that he could walk out of Workmen's Compensation at any time he wanted, even 5 or 10 years after the original award, and invoke federal sanctuary, that merely token opposition to the motion originally was presented. Thus, no opposing affidavit of the plaintiff himself was submitted even though the motion was on three weeks' notice (43).*

At first, it seemed unimportant to the petitioner *when* his attorney learned of the jurisdictional problem. The attorney was not he, and who could disprove the state of his mind? Thus, on the argument of the motion, as well as on the original papers, bearing in mind the oblique denials and attempted denials of the demands for admissions, plaintiff admitted that his attorney had examined the *entire* file in the Workmen's Compensation Bureau.

Accordingly, Judge Byers observed in his orginal decision,

> "The attorney does not deny his examination of the entire file in connection with his representation of his client before the Workmen's Compensation Board" (91).

The motion having been decided adversely to plaintiff, and upon grounds he hardly appreciated, it became expedient, to say nothing of essential, that this fact, to wit, the time of the attorney's examination of the file, be put in issue.

Indeed, following the oral argument, and for the first time, despite the direct assertions in the supporting affidavit (47, 63), petitioner gave heed to this feature.

As if the deciding Judge could possibly mistake a fact touching the very essence of his decision, petitioner on re-

---

* Numbers in parenthesis refer to folios in the transcript of the Record.

argument (which incidentally was not granted), said:

> "It is true that counsel did not in blunt language deny his examination of the entire file in connection with his representation of his client before the Workmen's Compensation Board, as stated by the court."

To which the Court adverted, in his memorandum, as follows:

> "The fact is that plaintiff was represented by his present attorney before the Compensation Board for the entire period stated in the said opinion, who made some examination of the file to an extent that he now minimizes" (113).

This "issue of fact" was not salvaged, however, as Judge Frank appears to have concurred with the "presumption" that flowed from petitioner's representation by an experienced and astute counsel (35, 84).

Now, mark a similar course with reference to another abortive factual issue, to wit, the payment of awards made.

It is a matter of record, not only in the Workmen's Compensation Bureau, but in the carrier's files by way of cancelled vouchers, etc., that this petitioner received compensation up to the very time that he withdrew, conditionally, his future claim. Originally, unconcerned with this particular issue, when the supporting affidavit charged that petitioner had received payments up to that point, amounting to $2,279.02 (42). Petitioner did not deny this.

Earlier in the Record, and by way of admission, it was specifically conceded that he received "approximately" this amount (38).

Following the adverse decision of Judge Byers the "amount" of payments received is, for the first time, challenged—and by whom? The plaintiff who was re-

quired under Federal Rule of Civil Procedure 56, Subdivision e, to make affidavits upon personal knowledge in opposition to a motion for summary judgment? No! But by his attorney who couldn't possibly have any such personal knowledge.

With reference to this item, therefore, the observation of Judge Clark is eminently correct (135).

As defendant felt no obligation to challenge the "new matter" in the affidavit for reargument (105), the Judge "corrected" his decision. This was gratuitous, particularly as reargument was not granted, and in any event, was treated as follows:

> "It may be appropriate to state that for present purposes the change is unimportant" (113).

The fact of the matter is that receipt of full payments is a matter of judicial admission.

Again, while the dissenting opinion adverts to the extent of the payments received, he magnanimously dismisses it as inconsequential in his decision (143).

And strangely enough, the factual conflicts seem to spring from the attorney's sworn statement, rather than of petitioner in other respects. The allegations with reference to petitioner's steady employment set out at folios 46 and 49 were not controverted by petitioner. And it was left to the attorney also to enhance this record, on rehearing, by the observation at folio 163. Meanwhile, plaintiff himself is claiming only a fracture of the eighth dorsal vertebra (162), while his counsel (p. 15 of the petition) are claiming "multiple fractured vertebrae".

A factual picture, processed to kindle the interest and incite the protective instinct of this High Court for the victimized, may be an innocuous byplay. But what useful purpose can it serve petitioner to refuse to meet the clean-cut legal issue posed below?

That issue in no way embraces the widespread field set forth in page 8 of the Petition, but is simply this, and the painstaking opinions, both prevailing and dissenting have culled out the issue with intellectual honesty, and candor.

Did the conduct of the petitioner, the carrier and the employer, under the Record herein, constitute "full compromise" within the meaning of *Callen* v. *Pennsylvania*, 332 U. S. 625, 68 Supreme Court 296?

The constitutionality of Section 113 of the Workmen's Compensation Law was not even challenged by counsel before the District Court or the Court of Appeals. Its constitutionality was not even mentioned in the District Court decisions. Its constitutionality wasn't even mentioned in either the prevailing or dissenting opinions in the Court of Appeals. Its constitutionality was assumed, because it did not purport in any sense to regulate within the Federal field. It is an instrument of compromise.

Again, no conflict of fact is to be found between the prevailing and dissenting opinions in the Court of Appeals. Essentially the prevailing opinion is embodied in this passage:

> "What we must look for, therefore, is a fair compromise whereby the parties settle their dispute in substitution for the litigation permitted by the Federal Acts; there is no mystic significance to be accorded a 'satisfaction' upon some assumed 'final award'. When a State procedure accomplishes just that by agreement of all concerned, it should therefore be at least as valid as a form of release secured on payment of a few hundred dollars. And certainly no invidious distinction should be made so that only a purely temporary injury can be settled in this way, and that any permanent injury is excluded from settlement just because the state process requires continuing payments for the good of the injured employee."

The essence of the dissenting opinion may be found in the following paragraph:

> "I am not saying that the State's legal rules (statutory or otherwise) concerning releases, compromises, or accords and satisfactions, do not apply to plaintiff's rights under the Federal statutes. Consequently, I would go along with my colleagues' decision, if the New York Courts had held that Section 113 of the New York Statute means that a release, or full compromise, or accord and satisfaction of claim like plaintiff's arises from (1) an agreement (express or implied) to abide by the Board's awards, together with (2) the Board's issuance of partial awards. But I think those Courts have not so held" (146).

ARGUMENT

POINT I

Section 113 of the New York State Workmen's Compensation Act does not constitute a "variable" in a field already preempted by Congress.

Neither *New York City Railroad* v. *Winfield,* 244 U. S. 147 (1916); nor *Erie Railroad* v. *Winfield,* 244 U. S. 171 (1916), has any applicability to the instant Workmen's Compensation Section. They had to do with an attempt to apply Workmen's Compensation remedies to railroad employees for injuries not resulting through the fault of the railroad, and obviously not recoverable under the Employer's Liability Act.

Section 113 recognizes the inviolability of Federal Jurisdiction, and suggests a mode of settlement provided the Federal rights are waived by all concerned. Indeed, in *Matter of Doey* v. *Howland Co., Inc.,* 224 N. Y. 30, the New York Court of Appeals recognized its limitations in this regard.

It is not without significance that in none of the four separate opinions (and this includes the scholarly dissent of Judge Frank), does anyone express concern about constitutionality.

In point of fact, if a method of adjustment as provided in Section 113 is unconstitutional, then *Brassel* v. *Electric Welding Co. of America,* 239 N. Y. 38, is likewise unsound, and can even now be upset, because it held, even without the statute, that the acceptance of a final award in Workmen's Compensation obliterated a Federal right, to wit, a maritime right!

POINT II

Section 113 of the New York Workmen's Compensation statute is not and does not purport to be "an exemption" within the purview of Section 5 of the Federal Employer's Liability Act, 45 U. S. C. A.

The answer to this Petitioner's Point II is to be found in the following passages of both the prevailing and dissenting opinions below:

> "This is, indeed, made explicit in the Federal Employer's Liability Act, Section 5, 45 U. S. C. Section 55, which makes void any 'contract, rule, regulation, or devise whatsoever' to *exempt* a carrier from liability. In construing the Act, the Supreme Court has held that nothing in the Act, and particularly in this section, operates to prevent an otherwise valid release of a claim by a railroad employee. *Callen* v. *Pennsylvania Railroad Co.,* 332 U. S. 625. The Court said: 'It is obvious that a release is not a device to exempt from liability, but is a means of compromising a claimed liability, and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties cannot settle their

claims without litigation, 332 U. S. at p. 631. And while there was dissent in that case the division in the Court was not over the question whether a release should be upheld at all, but as to how the fairness of the release, or possible fraud in it should be tested, and who should have the burden of proof. *That question in itself can hardly arise here, when the provisions for the employees' benefit are those set as fair by the Statutory law of the State''* (137, opinion of Judge Clark). (Emphasis supplied.)

Judge Frank observed:

"Undoubtedly, an employee, like plaintiff, can effectively, for a consideration, release his rights under the Federal Statutes (although the Supreme Court, construing Section 5 of F.E.L.A. requires that such a release be most carefully scrutinized). In the Supreme Court case which my colleagues cite, the employee gave a release for a sum which represented the full amount the parties had agreed upon—not a part payment with an understanding there would be further payments of amounts to be subsequently determined on the basis of facts not yet ascertainable. I assume, *arguendo* that a release would be good if the parties agreed upon the full amount, the employer made a part payment, and the payment of the balance was practically assured" (142).

Duncan v. *Thompson,* 315 U. S. 1, opinion per Judge Black, expressly saved bona fide settlements from the prohibition of Section 5, saying:

"The respondent contends, however, that Section 5 does not invalidate compromises of disputed claims and that the agreement here is in the nature of a conditional compromise. We need not here determine what limitations, if any, Section 5 places upon the

validity of agreements not to sue, if made in consideration of a bona fide compromise and settlement of claims arising under the act, because the very language of the agreement indicates it is not a compromise and settlement."

Significantly, the *per curiam* opinion, in *Boyd* v. *Grand Trunk,* 338 U. S. 263, observed:

"The vigor and validity of the Duncan decision was not impaired by Callen v. Pennsylvania Railroad Co., 332 U. S. 625, 92 Lawyer's Edition 242, 68 Supreme Court 296. We there distinguished a full compromise enabling the parties to settle their disputes without litigation which we held did not contravene the act, from a device which obstructs the right of the liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause."

To argue further in answer to petitioner's Point II, is to belabor the subject. So we direct our attention immediately to Point 3 which argues, assuming settlements are valid, the instant one was not a true "compromise".

First, as to the desirability of settling such claims by this method. Perhaps, the unheeded words of the learned and liberal Brandeis, in *New York City Railroad Co.* v. *Winfield,* 244 U. S. 146, should now be uttered in a more progressive day (Emphasis supplied in each instance by this briefer):

"In no other words, the majority of the Court declares that congress, by passing the Employer's Liability Act, prohibited states from including within the protection of their general Workmen's Compensation Laws, employees who, *without fault on the railroads part,* are injured or killed while engaged in Interstate Commerce; *although Congress itself offered them no protection."*

At page 165,

> "It was seen that no system of indemnity dependent upon fault on the employer's part could meet the situation, even if the law were perfect, and its administration made exemplary. *For, in probably a majority of cases of injury, there was no assignable fault; and in many more it must be impossible of proof.*"

At page 170,

> "I find no justification for imputing to congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation and otherwise unprovided for, *the protection afforded by the benificent statutes enacted in the long deferred performance of an insistent duty, and in a field peculiarly appropriate for state action.*"

It will not be lost on this Court that the dissent herein would uphold the statute when, as, and if it came to the aid of a slightly injured one, but would render it impossible to apply to a total permanent injury victim!

In this cogent sentence of Judge Clark is to be found the perfect answer to the dissent:

> "And certainly no invidious distinction should be made so that only a purely temporary injury can be settled in this way and that any permanent injury is excluded from settlement just because the state process requires continuing payments for the good of the injured employee" (138).

The situation is an ideal one for the adequate appraisement of an injury, as the State machinery embraces impartial medical as well as administrative staffs to ascertain the disability involved; and provides, by periodic payments,

the same convenient, practical and protective features of an annuity or retirement benefit.

In other words, it is not possible to "buy" an eye-out case for $250.00; nor to "close out" by release a "slight concussion" which might ultimately result in extended or permanent disability.

If to the charge of overreaching, and hoodwinking, "unwary and untutored employees" were added "unrepresented by able counsel," it would be more in keeping with fair comment.

Who really loses if this petition be granted? Every conscientious, injured railroad employee, who, knowing he has no just cause against the railroad for its negligence, would like to avail himself of the privilege offered him by Section 113 of the Workmen's Compensation Law, rather than be tempted into suit upon false premises. For it has to follow, that if under this record after all these payments, considering representation by an astute and learned attorney, the statute is still inoperative, no carrier or employer can safely invoke its terms!

We cannot understand, and, therefore, we take no space in answering, the matter embraced in the third paragraph of page 16 of the petition; other than to observe that this Court twice refused to review the decisions mentioned therein; the petition in each case being presented by the instant petitioner's counsel.

It is the respondent here that represents the "liberal" interest. Petitioner here is thinking only of petitioner's purpose;—to scuttle the Section against any future voluntary use by an injured employee, so long as he, Heagney, salvages his suit at law.

And do we need to enlighten petitioner's counsel herein, that, by and large, the seriously injured railroad employee who has a just cause in negligence against his employer may be expected to avail himself of the benefits of the

Act; that the sympathies of the jury certainly do not favor the railroad? On the other hand, the seriously injured employee, knowing he has no cause under the Federal Employer's Liability Act, may well find a willing employer to concur in an election under 113 of the Workmen's Compensation Law, the latter making the Workmen's Compensation payments in practical appreciation of those jurors' "sympathies."

And what did the *Callen* case intend by "full compromise?"—an immediate transference of full, final, and complete consideration? Or something in line with the prevailing opinion:

> "Quite in point, therefore, is Professor Corbin's enlightening discussion of compromise agreements, and their connection with executory accords. Thus he says: 'by thinking and speaking in terms of "compromise," the existing befuddlement in regard to "executory accords" is avoided.' 6 Corbin on Contracts, Section 1268, 1951. Hence, as he points out, there may be a compromise furnishing an agreed-upon substitute for performance which, in turn, may require specific performance, although generally it may be reasonably clear that the parties intend a discharge 'only when the compromise performance is rendered' " (138).

Depending upon the intention of the parties, a compromise may be full and complete, and, therefore, a substitute for the right compromised, even though future action is contemplated. Thus, Judge Swan said in *Wyatt* v. *New York, Ohio and Western Railroad Co.*, 45 Fed. 2nd 705:

> "If the parties so intend, the contract of accord may *itself* be taken as a satisfaction and discharge of the original claim; but the intention must be clear and the presumption is otherwise." (Emphasis supplied.)

To this he cited Williston on Contracts, Sections 1846, 1847.

The much-cited *Larcy* v. *T. Hogan and Sons, Inc.,* 239 N. Y. 298, recognizes the distinction, noting:

> "*Payment* and not *agreement* was to be the full and complete satisfaction." (Emphasis supplied.)

There is nothing new or revolutionary about this concept, because it was assumed to be fundamentally sound in *Irish* v. *Central Vermont Railroad,* 164 Fed. 2nd 837, wherein the unanimous court, comprised of two of the Judges sitting in this case, to wit, Chase and Clark, observed:

> "The Federal Rule is more liberal. If the promise to try to get the plaintiff a pension was made and was a part of the inducement to try to get the release, it may have been a false representation of a material fact, viz., that the claim agent intended to perform his promise."

The release, envisioned there, involved not only present payments, but future payments by way of a pension.

For all practical purposes, every cent, every benefit, to which this claimant is entitled, is as secure as the State of New York itself. And if, claimant may look forward to at least $15,000 and possibly $30,000 benefits in the future (163), should not this disposition be at least as valid as "a form of release secured on payment of a few hundred dollars"? (138).

POINT III

There being no conflict in a material fact, summary judgment was proper.

Judge Byers said, in granting this motion:

> "The voluminous papers on the motion, as has been said, do not disclose any contested question of fact as to the matters herein discussed, argument being con-

fined to the legal effect to be attributed to the plaintiff's dealings with the Workmen's Compensation Board, and the defendant's performance of its statutory duties so set in motion by the voluntary action of the plaintiff in seeking compensation in preference to incurring the possible hazards of litigation.

"The issue is one of law, appropriate, as I believe, for disposition in such a motion. The taking of testimony could not possibly add anything to the record as now made, and nothing therefore is to be gained by deferring a decision on so plain and undisputed a state of facts" (93).

The prevailing opinion in the Court of Appeals said in part:

"If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer. Hence there was no genuine issue as to the fact of waiver, and the only question which remains is as to its validity" (136).

The conclusive presumption arising out of representation of counsel, was adopted by the dissent (141).

When we consider the profound study which was given this record not only in the District Court, but in the Court of Appeals, and that there is complete unanimity below regarding the significance of representation by counsel, may we not entertain the confident hope that this court too, will unanimously conclude:

"From the time when plaintiff's lawyer participated in the State Board's proceedings, his knowledge of the nature of those proceedings must be imputed to plaintiff" (141).

This Court will the sooner reach that conclusion if it considers that, long before any appearance before the Board, the claimant admittedly signed a statement, using in part these words:

"I have no intention of *suing* my employer, but going to take *voluntary* compensation.

Have read the foregoing statement and to my own knowledge and belief it is true and correct" (16). (Emphasis supplied.)

Then followed a Hearing on the question of jurisdiction, following notice to the claimant, said Hearing being conducted by an impartial State Officer (87).

Undoubtedly, it was only because of the summary nature of the proceeding, that Heagney was not considered bound by his own personal attendance at the "jurisdiction" Hearing. Judge Byers assumed otherwise "for the purpose of decision only" (114).

If the plaintiff may not be presumed to know his own rights (and knowledge of the law is one of the most fundamental presumptions known to the common law), at least plaintiff, represented by counsel, is presumed to know his rights; and when between the two of them they commit themselves as appears from this record, then, this court may well observe:

"When we take our seats on the Bench we are not struck with blindness and forbidden to know as Judges what we see as men."

U. S. Pipe and Foundry Co. v. *Haynal,* 146 Misc. (N. Y.) 812, 818.

What this claimant could waive, his lawyer could waive.

To say otherwise is to unsettle, possibly, a vast amount of litigation.

To challenge this principle is to disagree on the law, not on the facts. Thus, *Blair* v. *Baltimore and Ohio Railroad*, 323 U. S. 600, is not in conflict. If the plaintiff is not bound by the presumed knowledge of his lawyer, who from the start knew that he had fallen off a railroad locomotive (63), then henceforth, Instability, thy name is Law, to use a euphemism, in place of Mr. Bumble's larconic term.

POINT IV

The New York Law supports the prevailing opinion.

There is perhaps no more formidable champion for the liberal view than the dissenter herein. Yet, in conscience, he could not criticize the carrier or the employer in any way. If fraud or overreaching, or any form of unfair dealing, existed on their part, he would be the first to boldly proclaim it. His opinion, obviously based upon an extensive research, and a profound study of the subject, deserves something more than the total ignorment accorded it by the petitioner for one purpose, and the deadly attack upon it for another. The conflict here is one of legal principle, and is narrow in scope. The disagreement was on a fine point. Both sides could not escape drawing certain similar conclusions regarding the conduct of petitioner below. Suffice to say that in the process, respondent emerged unscathed.

A distinct service, therefore, could have been rendered to this Court if petitioner adopted the attitude of the dissent, and carried that specific dispute to this Court. Why didn't or couldn't petitioner do this? Could it be that he was afraid to adopt this candid position of Judge Frank:

> "I am not saying that the State's legal rules (statutory or otherwise) concerning releases, compromises or accords and satisfactions do not apply to plaintiff's rights under the Federal statutes. Consequently, I would go along with my colleague's decision, if the New York Court had held that Section 113 of the New York Statutes means that a release, or full compromise, or accord and satisfaction of a claim, like plaintiff's arises from (1) an agreement (express or implied) to abide by the Board's awards, together with (2) the Board's issuance of partial awards. But I think those Courts have not so held" (146).

Some confusion appears to have crept into the problem by virtue of the *Brassel* and *Larscy* cases; neither of which involved Section 113, which was later passed. Obviously, in the absence of some statute under which an initial award, or an intermediate award, could be made binding upon all the parties concerned, so that, jurisdiction being adjudicated, all future awards are insured, there could be no accord and satisfaction of a Federal claim in the absence of complete payment, amounting in effect to estoppel.

The point that is overlooked in all cases succeeding *Fitzgerald* v. *Harbor Anchorage Co.*, 244 N. Y. 132, is that once the waiver takes place in open hearing, as is required under the practices of the Workmen's Compensation Board, for all practical purposes, "satisfaction" is guaranteed, because all subsequent awards can be enforced, and neither the carrier nor the employer can escape.

Thus, under this record, the $15,000 minimum award value of this claim, if petitioner's claim holds up (163), is "money in the bank" for him right now. Despite the fact that no clear waiver had been shown in the *Fitzgerald* case, and there was no necessity to pass on its constitutionality, Judge Crane and McLoughlan, and Chief Judge Hiscock concurred in holding claimant bound by his waiver

under the statute, despite only partial awards. The vigorous opinion of Judge Crane is too extended to set out.

Certainly the validity of the statute has been unimpaired by any existing New York case. Why should its language be construed to mean that a waiver cannot take place until possibly years after the beginning of compensation payments? The statute reads in part,

> "awards according to the provisions of this chapter may be made * * * in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies * * *" (45).

One easily gathers from the language of the several cases dealing with the Section that there is no such limitation upon "waiver" as is contended by petitioner. Once the Board, and it will be seen from the record the care with which this matter was followed in the Board (84), establishes the necessary jurisdictional features, it can thereafter effectively render decisions and awards, as irrevocable waiver has taken place.

It would be little short of startling to the Appellate Division of the Third Department, New York State Supreme Court, to learn of such limitations.

In *Kane* v. *Morse Dry Dock and Repair Co.,* 250 A. D. 888, appeal dismissed 277 N. Y. 533, motion to amend remittitur denied, 277 N. Y. 652, the unanimous Appellate Division said:

> "The employer has waived his right to question the jurisdiction of the Workmen's Compensation Law by reason of Section 113."

In *Turner* v. *Morse Dry Dock and Repair Co.,* 255 A. D. 896, the unanimous court said:

> "There was sufficient before the State Industrial Board to justify finding that the self-insured employer

waived its admiralty rights and assumed liability to pay the award."

In *Hoaglund* v. *Morse Dry Dock and Repair Co.*, 255 A. D. 895, the unanimous court, upholding the award, noted:

> "For the Board it was asserted that there had been a waiver in accordance with Section 113 of the Workmen's Compensation Law whereby the employer has waived its right to question the jurisdiction of the Board."

Query. When does this waiver of the right to question the jurisdiction of the Board take place, years after the first hearing, or immediately after the first hearing?

The significance of these decisions is epitomized in the compelling language of Judge Clark:

> "In these cases, as in the one before us, there had been long continued payment and acceptances of awards made by the Board; the Courts had no occasion, as we have none, to determine how much less than the continuous acceptance of officially adjudicated awards actually shown might be sufficient to satisfy the state statute and the federal law" (139).

"Finality" could play no part in these decisions, for it is almost proverbial that a compensation claim never dies. Cf. Sec. 123, New York State Workmen's Compensation Act:

> "Jurisdiction of Board to be continuing the power and jurisdiction of the Board over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings, awards, dedications or orders relating thereto, as in its opinion may be just, except that, where the employer has secured the payment of compensation

in accordance with the provisions of section fifty of this chapter, no claim for compensation or for death benefits that has been disallowed after a trial on the merits, or that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident or death. Nor shall any award of compensation or death benefits be made against the special fund provided in section twenty-five-a of this chapter or against an employer or an insurance carrier where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation. As amended L. 1940, c. 686, Sec. 4; L. 1946, c. 113, Sec. 52, eff. March 14, 1946."

In these days of overwhelmed Court Calendars, particularly in personal injury cases, and over-worked Courts in general, compromises, fairly entered into, are to be favored. Petitioner's success here will be a telling blow at this one, forward looking, practical source of settlements.

This specific case has been justly decided. Upon this Record a contrary decision would be a mockery of legal principles. It would be a mistake to assume that the Railroad Brotherhood, in person or in spirit, applauds this petition; because, if its interests are involved, it would be the better advised to seek a review, later, upon a more touching record.

A distinct disservice is being rendered that large body of workers by this petition, burdened by contradictions, and utterly devoid of equity.

The writ of certiorari runs to the ingenuous, the abused, —not the artful.

It should not here be granted.

Respectfully submitted,

Robert E. Curran,
Thomas P. Curtin,
Henry A. Mulcahy,
Counsel for Respondent.

Office - Supreme Cou
FILE
FEB 11 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 488

EDWARD HEAGNEY,

Petitioner,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

PETITION FOR REHEARING

CARLTON A. WALLS,
Counsel for Petitioner,
No. 55 John Street,
New York City, N. Y.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 48 NEW CHAMBERS ST., N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 488

EDWARD HEAGNEY,

Petitioner,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Edward Heagney for reconsideration of the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit, which was denied on January 28, 1952 respectfully shows:

The denial of the Writ of Certiorari is inconsistent with the decision in Dice v. The Akron, Canton and Youngstown Railroad Company.

In the *Dice* case, No. 374—October Term, 1951, decided on February 4, 1952, the Court stressed the neces-

sity of uniform application of the Federal Employers' Liability Act throughout the country. Such uniformity cannot be obtained if, as in this case, an injured employee is not permitted to pursue his remedy under the Act because of a State statute which provides for waiver of such rights.

The question whether the conduct of the petitioner could be construed as a waiver of his rights under the Federal Employers' Liability Act was one which had to be determined in the light of all the circumstances. It presented a question of fact. The District Judge, however, decided it as a question of law and granted Summary Judgment. By so doing he deprived the petitioner of his right to trial by jury.

Wherefore your petitioner prays that the Court reconsider his petition that a Writ of Certiorari may issue out of this Court to the Court of Appeals for the Second Circuit.

Dated, February 8, 1952.

Respectfully submitted,

CARLTON A. WALLS,
Counsel for Petitioner,
No. 55 John Street,
New York City, N. Y.

CERTIFICATE OF COUNSEL

I, CARLTON A. WALLS, counsel for the above named petitioner, DO HEREBY CERTIFY that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay; and said petition is restricted to circumstances of a substantial effect intervening since the denial of same.

CARLTON A. WALLS,
Counsel for Petitioner.